



United States of America
Environmental Protection Agency

A FAX FROM: Region 6

TO:

Jackie Hardie

FAX NO:

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SUBJECT:

Draft Comments - Municipal Setting Designations Bill

FROM:

Rick Ehrhart

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COMMENTS:

Jackie,

Please find attached our comments that we talked about this morning.

Comments 1-3 are priority issues, all others are offered as ones that could be addressed in reg development or guidance. Please feel free to call us to discuss.

We would certainly like to have a copy of the latest versions of these Bills. It would be great if you could fax us a copy, or let us know where we could get a copy off the net.

thanks

DATE and TIME:

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Draft Municipal Setting Designations Bill, Texas Senate Bill 1761

1. Prevention of Future Withdrawal Petitions. The draft legislation may impact some of Texas' federally authorized programs particularly Resource Conservation and Recovery Act (RCRA) and Underground Storage Tank (UST). In light of the number of petitions to withdraw state programs the Region has and is responding to, we need to be sure that the proposed legislation will not generate additional actions.
2. Recognition of Federal Authorized Programs. The language in the proposed legislation is very opened ended and uses terms that are not defined and therefore subject to broad interpretations. In section 361.808(a)(2), the draft bill states "conduct response actions to remove, decontaminate, or control environmental impacts to groundwater based solely on potential potable water use." Provisions of RCRA (in particular 40 Code of Federal Regulations (CFR) 264 and 40 CFR 265 Subparts F and G) and UST (in 40 CFR Subparts D, E and F) require actions for a release without regard to the quality of the groundwater. These provisions also require specific actions, such as monitoring, investigating and reporting, which section 361.808(a)(2) and other part of the proposed legislation may supercede or otherwise exempt an owner or operator from complying with. The draft bill should acknowledge that the rule does not obviate any federal authorized program authorities (e.g., RCRA, UST, Underground Injection Control). For example the draft bill could be revised to include language such as "Nothing in this legislation is meant to alter or supercede any requirement of a federally authorized environmental program administered by Texas" or "The provisions of this Act are to be interpreted or construed so as not to impact Texas' ability to maintain authorization for the federal environmental programs it administers."
3. Public Participation. The legislation does not appear to provide the public sufficient opportunity to review and comment requested municipal setting designations which could directly affect them now or in the future. The limitation of the city notification to only those cities located within one-half mile of the property for which designation is sought, appears arbitrary (section 361.805). Also, the establishment of a municipal setting designation area can be considered somewhat equivalent to remedy selection in RCRA. In RCRA, this is usually a permit modification entitled to full public participation. In UST, this is governed by federal regulations found at 40 CFR 280.67. Both require far more extensive public participation than provided for in the draft legislation. We suggest full public participation (e.g., public notice, opportunity for comment, potential for hearing) be required as part of the application and decision making process for a municipal setting designation and any future expansion of the designation.
4. Applicant Eligibility. Eligibility criteria currently allows any "person" to apply for a municipal setting designation (section 361.803). The decision to apply for an area wide groundwater cleanup exemption is directly related to critical governmental functions (e.g., provision of potable water, protection of local health). Therefore, we believe only local governmental entities should be allowed to apply for municipal setting designations.

5. Municipal Setting Designation Application Denial Criteria. Under the draft bill, the state can deny an application if the eligibility criteria are not met, the application is incomplete, or the designation would impact water resource needs or obligations of cities within one-half mile (section 361.806(a)). We believe there are other factors which should impact the decision to grant or expand a municipal setting designation area.

- a. Protection of Human Health and the Environment. We suggest the application denial criteria include any state determination that a denial is necessary to protect human health or the environment.
- b. Movement of Contamination. The state has several areas of karst and alluvial type aquifers where groundwater flows are so rapid that the one-half mile buffer currently proposed in the draft bill may not be sufficient to protect down gradient wells. We suggest the application denial criteria include any state determination that the contamination may migrate outside the requested municipal setting designation area (either horizontally or vertically).
- c. Wellhead Protection or Sole Source Aquifer Areas. Areas in a wellhead protection area (or equivalent area), or over a sole source aquifer should not be eligible for a municipal setting designation.
- d. Water Resource Needs of Any City. The draft bill allows application denial if the municipal setting designation will "negatively impact the current and future regional water resource needs or obligations of any municipality whose boundaries are located within one-half mile of the property for which the designation is sought" (section 361.806). We believe this application denial should be extended to any municipality, not just those within one-half mile distance.

6. Municipal Setting Designation Eligibility Criteria.

- a. Community Size. Eligibility criteria allows entities to apply for properties located within the corporate limits or extraterritorial jurisdiction of a municipality that has a population of at least 20,000 residents (section 361.803(1)). The difficult decision to eliminate groundwater cleanup should be contingent in part upon obtaining the indirect environmental benefits reaped from brownfields redevelopment in heavily urbanized areas (e.g., preservation of open space by greenfields development avoided). Additionally, many small cities may be challenged to retain sufficient expertise to determine if a municipal setting designation is best for its citizens. We suggest municipal setting designations be limited to municipalities with populations of more than 100,000.

- b. Protectiveness of Local Ordinance. Eligibility criteria requires that the property for which the designation is sought must ultimately be subject to either a local ordinance or a restrictive covenant which prohibits the use of the groundwater beneath the property as potable water (section 361.803(3)). A local ordinance may be subject to revision over time and we are concerned the local ordinance mechanism may not provide for the long-term protectiveness of the remedy. [Agree (local ordinance not sufficient) with EPA IC guidance? Restrictive covenants can change too?]
- c. Eligibility Criteria versus Application Denial Criteria. The application denial criteria (section 361.806) is not reflected in the eligibility criteria (section 361.803). For example, while the application denial criteria relates to *current and future regional water resource needs* of cities located within one-half mile, the eligibility criteria is more limited in scope, that is it relates to the *current use of groundwater for potable uses* in cities located within one-half mile [emphasis added]. We suggest all application denial criteria, including those recommended in these comments, be included in the designation eligibility criteria.

7. Application Requirements. An applicant must submit a form (content unknown at this time); basic applicant and site information; a statement concerning the city's support; and an affidavit that eligibility criteria are satisfied, accurate copies have been provided, and a notice to relevant municipality was done (section 361.804(b)). We believe more information should be provided with a municipal setting designation application.

- a. Baseline. The municipal setting designation decision should consider the human health and environmental impacts associated with the requested municipal setting designation. An assessment of human health and environmental impacts associated with the requested municipal setting designation (with supporting information) should be part of the application. The information could include the type, degree, and extent of contamination horizontally and vertically, and relevant groundwater characteristics as it exists at the time of application (that is an area baseline). The assessment would also assist efforts to assure that subsequent land reuse does not contribute to the existing groundwater contamination.
- b. Movement of Contamination. Based on the stated purpose of the draft bill (section 361.802), it appears that a primary purpose of making a municipal setting designation is to recognize that groundwater in a specific area is unusable due to its overall quality or because contamination precludes its future use. There is no requirement in the draft bill, however, for the applicant to assess whether existing groundwater contamination could migrate outside the designation area. We believe it is essential to make an initial evaluation of the contaminants in the groundwater to provide a baseline of the conditions in the designation area and then an assessment of the potential movement of the contaminants (both horizontally and vertically). This initial evaluation and subsequent migration

assessment will provide some assurance that contaminants will not migrate beyond the municipal setting designation area. We suggest the initial evaluation and subsequent migration assessment, with supporting information, be part of the application.

- c. Evaluation of Negative Impacts to Water Resource Needs. Though the application can be denied based on impacts to water resource needs, the applicant does not address this issue (section 361.806(a)(2)). The application should include an evaluation (with supporting information) concerning any potential negative impacts to current and future water resource needs from the requested municipal setting designation.
- d. Post-Certificate Monitoring. The certification (section 361.807) as proposed is a one time determination. A one time determination, however, does not take into account any future activities that may change the premise of the certification. Under the draft bill, if no potable wells are within one-half mile of the designation area, then the state may not require a person addressing environmental impacts to conduct an investigation of the nature or extent of contamination in groundwater or to conduct a response action, unless to ensure the protection of humans from non-potable water use and ecological resources within the designation boundary. Because there are no controls required outside the municipal setting designation area some level of evaluation should be required to help ensure that whatever contamination which exists within the designation area remains within that zone, even if potable wells are not located within one-half mile. Monitoring may be required to ensure long term protectiveness. A monitoring plan will help ensure the long term protection of humans (unrelated to potable use), and ecological resources (sections 361.808(b)(1) and (2)). Monitoring will also ensure the integrity of the vertical and horizontal boundary through time and alert the state of any groundwater contamination migration outside the designation area. We suggest the draft bill be revised to require a groundwater monitoring plan (tailored to site specific conditions and designed to provide sufficient data to periodically evaluate the protectiveness of the designation and potential migration of the contamination) be included in the application.
- e. Vertical Limits of Designation Area. The application, and certificate, should clearly identify which aquifers the municipal setting designation applies to (vertically and horizontally).

8. Certificate Requirements.

- a. Certificate Reopeners and Withdrawal Based on Contamination Migration. The draft bill allows the expansion of the municipal setting designation area to include properties with impacted potable wells discovered after the certificate issuance (section 361.808(e)(2)(B)). Allowing the expansion of the area to include newly impacted area may undermine the public's belief in the protectiveness of the designation. The bill should ensure the designation area is not easily expanded and groundwater contamination within the designation area is maintained within that zone (both horizontally and vertically). Preventing migration may require modeling, monitoring, or containment of contaminant plumes. If contamination migrates beyond the municipal setting designation area, either the certificate should be reopened and reevaluated (with full public participation) or withdrawn.
- b. Certificate Withdrawal Based on Monitoring Plan. Non-compliance with a groundwater monitoring plan should be a condition for withdrawal of a certificate.
- c. Certificate Withdrawal Based on Institutional Controls. Non-compliance with institutional controls (ordinance, restrictive covenant) should be a condition for withdrawal of a certificate.
- d. Certificate Withdrawal Based on Periodic Review. The state should review municipal setting designations periodically to assure long term protectiveness of the remedy. The withdrawal of a certificate should be a possible outcome of the review.
- e. New Industrial Development in Designation Area. Special conditions should apply for any industrial facility (e.g., RCRA facility) which begins operation in a municipal setting designation area after certificate issuance. In an effort to assure the facility does not adversely impact the groundwater situation, a facility should be required to investigate the groundwater situation as it exists when operation begins (a site specific baseline) and to conduct response actions to address any additional degradation of the groundwater resulting from the facility's operation.

9. Definition/Explanation of Terms, Need for Additional Clarifications.

- a. A definition (section 361.801) should be provided for "consumption" (to include drinking, showering, bathing, or cooking) to avoid confusing the term with ingestion (from drinking or cooking only) in later passages.
- b. The term "municipal property" (section 361.802) is not defined. For clarity, we suggest you consider using alternative language or define the term.
- c. It is unclear what "restricting [sic] other uses of groundwater . . . in a manner *consistent with maintaining groundwater quality*" [emphasis added] means (sections 361.803(3)(A) & (B)).
- d. The term, "environmental impacts to groundwater," is used throughout section

361.808 but is not defined. We recommend the term “contaminants” (which is defined in the document) be used or the term “environmental impacts to groundwater” be defined.

- e. The “person addressing environmental impacts” is required to provide an alternate water supply to owners of impacted potable water wells for as long as the wells exceed the human consumption or ecological standards (section 361.808.). It was not clear what entity will make the determination that the groundwater meets standards and the restrictive covenant can be lifted.
- f. For clarity, we suggest the application requirement in section 361.804(b)(2)(C) be revised to read: “a statement as to whether the municipality that contains the property for which the designation is sought, *and* any municipality within one-half mile of the property for which the designation is sought, supports the proposed designation.” [emphasis added]